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Civil Code and Related Subjects: Successions, Donations and Community Property

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Edwards v. Town of Ponchatoula[24] the court made it unmistakably clear that the tax exemption features available to new industries by Section 22 of Article X of the State Constitution are to be granted in strict compliance with the procedures therein set forth and are not to be made the subject of barter and trade as ordinary commodities of commerce. A corporation whose original certificate of exemption issued by the State Board of Commerce and Industry was about to expire contemplated expansion and approached the municipal authorities with the proposition that, in return for the enactment of an ordinance contracting the corporate limits in such a manner as to exclude its properties therefrom, it would agree to expand its facilities, thus affording additional employment opportunities, purchase certain needed equipment for the city and make other payments and improvements. Following a consideration of the proposal the town council obliged by enacting the desired legislation and taxpayers (including another corporation) sued to have the ordinance set aside.

In his opinion Justice Fournet realistically reviews the facts, concluding that the entire episode was a piece of taxation-gerrymandering and invalidated the ordinance as an attempted circumvention of the constitutional provision[25] requiring that proposals for the creation or extension of such exemption be submitted to a vote of affected property taxpayers. The decision is indeed commendable.

III. CIVIL CODE AND RELATED SUBJECTS

SUCCESSIONS, DONATIONS AND COMMUNITY PROPERTY

*Harriet S. Daggett**

SUCCESSIONS

After a thorough and eminently fair survey of all the facts, the court in *Succession of David*[1] found that the administrator, though failing through ignorance to comply with many details of legal procedure, had justly and honestly and attentively cared for the involved estate. Furthermore, he had performed what the court termed the "thankless task" with the consent and indeed, at the earnest insistence of the heirs. Obviously, Article 1150,

24. 213 La. 116, 34 So. (2d) 394 (1948).
25. La. Const. of 1921, Art. X, § 22.
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1. 213 La. 707, 35 So. (2d) 465 (1948).

providing for penalties when the administrator fails to observe certain laws of procedure in administration, should not have been applied and in the sound discretion of the court was *not* applied. Abundant authority for the decision is available.

In *Pelican Well Tool & Supply Company, Incorporated v. Sebastian*[2] the plaintiff, creditor of deceased, was unable to prove affirmatively a tacit, unconditional acceptance of the succession and community by the daughter and widow and hence could not hold them personally for the debt. Intentional acceptance of property known to belong to the succession is necessary. Acts of piety or humanity and conservatory acts do not constitute acceptance.

In *Lions v. Reine*[3] it was decided that the judge of the district court had not abused his discretion by ordering a plantation with equipment sold when a separate sale of the equipment, movables, would have decreased the value and possibility of sale of the land and the movables would not have brought enough to settle debts, even though only a part of the land would have been enough to balance the deficit.[4]

The *Succession of Yeates*[5] was concerned with proof of a sale, resulting in finding it to have been a donation in disguise and null. It was ordered that the property be listed as part of the mass of the succession. The allegation that the will of deceased was void due to her lack of mental capacity was disproved and it was decreed that the will be probated. A favored son was to receive all of the disposable portion as an extra portion. Article 1492 negated the contention that the will had been confected under undue influence. Article 1533, prohibiting donation of naked ownership with reservation of usufruct to the donor, was applied.

DONATIONS

Inter Vivos

The current issue of this journal contains a note discussing the case of *Atkins v. Johnston*[6] so a prolonged resumé will not be given here. The decision raises grave doubts regarding several points. The tacit revocation of a gift is disapproved by the dis-

2. 212 La. 217, 31 So. (2d) 745 (1947).
3. 212 La. 559, 33 So. (2d) 113 (1947).
4. See Arts. 1165 and 1166, La. Civil Code of 1870.
5. 213 La. 541, 35 So. (2d) 210 (1948).
6. 213 La. 458, 35 So. (2d) 16 (1948), noted in (1949) 9 LOUISIANA LAW REVIEW 294.

senting justice. The possibility of attack by forced heirs of the donor is denied by the majority opinion. If the donation is validly revoked by consent of the parties and the property revested in the estate of the donor, it may well be that his forced heirs would have no cause to complain regarding their portions as the donor's estate sustained no diminution by the gift. If it so happened that the original donee, consenting to the revocation, had forced heirs, might they not complain that this voluntary relinquishment was a gift?

A wife made a donation to her husband in 1924. Five years thereafter she was interdicted. Her curator sought to be allowed to revoke the donation in *McIntyre v. Winnsboro State Bank & Trust Company.*[7] The court declared that Act 187 of 1942, making interspousal gifts irrevocable, made clear that gifts perfected before the effective date of the act were not to be affected. The court properly found that the right to revoke was personal to the donating spouse and could not be exercised by the curator without other reason than mere choice. However, in the alternative, the curator asked to be permitted to revoke under Article 1497, as the donation had been of all the goods of the donor. This right was said also to be personal to the donor in that it could not be exercised by anyone after the death of the donor. However, since the purpose of the article is to prevent the donor becoming a charge upon the state, the court found that the curator of the living interdict could exercise the right in her interest.

Mortis Causa

The well-known principle that a will is not void but reducible because the testator failed to leave the forced share to those entitled to it was reiterated in *Roach v. Roach.*[8] Since proof that the neglected forced heirs had previously received their shares failed, their proper portions were protected. *Jordan v. Filmore*[9] was again reaffirmed as giving a correct interpretation of Article 1501 when deciding that it is not necessary to label an extra portion in a will to protect the bequest from collation.

The *Succession of Babin*[10] involved interpretation of the following clause of decedent's will: "Should Robert A. Hart die before I do then it is my will that so much of my estate as he

7. 213 La. 914, 35 So. (2d) 853 (1948).
8. 213 La. 746, 35 So. (2d) 597 (1948).
9. 167 La. 725, 120 So. 275 (1929).
10. 213 La. 950, 35 So. (2d) 864 (1948).

would have otherwise taken under this will shall belong to and I hereby give and bequeath the same to his heirs."[11]

The uncle, residuary legatee under this will, died before the testatrix leaving nieces and nephews, including the testatrix. The executor of Mrs. Babin's estate proposed to divide the legacy by heads among the surviving heirs of the predeceased uncle and apportion the inheritance tax accordingly. Opponents thought the division should be by roots and it was so held. The court reasoned that the rights in the residuum were to be fixed as of the date of testatrix' death, not that of her uncle and that distribution should be made to the heirs of the uncle in the same manner as though he had died after her, transmitting his right under the will as one of the items of his succession.

The will in question in *Succession of Smart*[12] was found to be a valid olographic will though three special bequests were found to be prohibited under Article 1520 and hence void. One attempted legacy was found meaningless. A penciled line was of doubtful origin and if considered not to be in the hand of the testatrix must be regarded as not having been written under Article 1589.

In *Succession of Carre*[13] the supreme court decided that the constitutional amendment of 1944 relative to adoption[14] did not have the effect of giving an adopted child the same rights as a legitimate child and hence an adoption did not revoke a will of the adopting mother made prior to the adoption.[15] Legislation of 1948 affecting this subject has been reviewed in the fall issue of this journal[16] and will not be repeated here.

COMMUNITY PROPERTY

The opinion by Justice Hawthorne in *Succession of Geagan*[17] is one of the most interesting and forward looking expressions with regard to community settlements that has appeared in recent years. In a contest between the widow and a son by a former marriage of the deceased several items were in dispute. The general approach by counsel for the widow was that the deceased husband had tried to defraud her, the second wife, by placing community property beyond her reach. The facts seem

11. 35 So. (2d) 864, 865.
12. 36 So. (2d) 639 (La. 1948).
13. 212 La. 839, 33 So. (2d) 655 (1948).
14. La. Const. of 1921, Art. IV, § 16.
15. See Art. 1705, La. Civil Code of 1870.
16. Louisiana Legislation of 1948 (1948) 9 LOUISIANA LAW REVIEW 18, 24.
17. 212 La. 574, 33 So. (2d) 118 (1947).

to bear this plea out but a careful analysis had to be made to ascertain what the husband might do legally, whatever his motive, and what transactions by him were prohibited. Two purchases of United States government bonds were in question, both during the existence of the second community. The first purchase was soon after the second marriage and counsel pleaded that these bonds must have been purchased with deceased's separate funds as he did not have community funds at that time of sufficient amount to cover. The court found this "negative proof"[18] insufficient to overcome the presumption of community. Ownership of the bonds under the federal law remained in the beneficiary, the son, but the court in awarding the widow judgment against the son, individually, for one-half the value of the bonds at the death of the husband made the following observation:

> ". . . we will not permit William J. Geagan, Sr. to do by contract with the Federal government what he could not have done by donation mortis causa in this state, that is, dispose of his wife's share of the community property at his death in favor of a third person."[19]

The second purchase of bonds and certain shares of stock were donated to the son and the court found these donations invalid. The observation of the court in this connection is set forth:

> "In our opinion the wife should not have to prove fraud and injury in order to set aside gratuitous dispositions of valuable movable property. In modern times, when movable property may and often does constitute the great bulk of the wealth, the husband should have no more right to dispose of movables gratuitously without the consent of his wife than he has to dispose of immovables. It appears to be a matter of sufficient importance to warrant the Legislature's giving this provision of our law serious consideration."[20]

The justice pointed out that not every donation of movables would be invalid nor every donation in this specific proportion but that the "overall picture indicated disposition to injure the wife."

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18. 212 La. 574, 586, 33 So. (2d) 118, 122.
19. Ibid.
20. 212 La. 574, 599, 33 So. (2d) 118, 126.

It was found that the corporation organized by the husband was valid and had not injured the wife, as the community assets were in existence as shares of stock at fair value in exchange for the investment. Hence, purchases of property by the corporation were valid. The claim of the widow for salary from the corporation for services by the husband was allowed to the credit of the community. The son claimed that the community owed the husband's separate estate the amount which would bring the separate estate's value to the figure which it was when the community began. The court said:

> "The evidence in the record does not satisfactorily establish that the decedent had a separate estate valued at $41,000.00, but, assuming that this is true and that it was the only proof relied upon, we know of no law, nor have counsel cited any, to the effect that at the dissolution of the community it owes each separate estate the value of whatever property the spouse had at the time of the marriage."[21]

A wife while living separate and apart from her husband, acquired certain property. She subsequently acquired a divorce from her husband and later contracted to sell the property. She brought suit in *Johnson v. Johnson*[22] to force performance of the contract to sell. The defendant had refused to take title because the property had been acquired during the community and the husband was not a party to the subsequent sale nor had the property been declared the separate property of the wife in a judicial settlement between husband and wife. The court found in favor of the defendant and even admitting arguendo the presumption that the property bought by the wife while living apart from her husband was her separate property, the defendant was not bound to take a "presumptive title."[23] Disclaimer of title by the husband was entered after a reasonable time had elapsed so the suit for specific performance failed.

A husband acquired during marriage a piece of land by a dation en paiement in cancellation of a debt owed him prior to his marriage. The husband in *Slaton v. King*[24] sued his divorced wife for slander of title to this property which he maintained was his separate property, as she had granted a mineral lease upon an undivided one-half of it as she maintained that it was

21. 212 La. 574, 603, 33 So. (2d) 118, 128.
22. 36 So. (2d) 396 (La. 1948).
23. 36 So. (2d) 396, 399.
24. 36 So. (2d) 648 (La. 1948).

a part of the community previously existing between her and the plaintiff. The court held the property to have been community property as title to it was acquired during the community with no recitations that it was separate property of the husband acquired for his separate benefit with his separate funds. The court likened the giving in payment to a sale—*not* an exchange, the exception to the general rule. Cases dealing with separate property of the wife were of course, distinguished. The wife's recitation in her petition for divorce, that there was no community property, did not estop her, as plaintiff had not been misled or damaged by her statement.

For the second time the *Succession of Ratcliff*[25] reached the supreme court. The appeal was from the final account of the executors, "which contained the basis for settlement of the community estate." Mrs. Ratcliff had been charged with her percentage, 5.82, of the administration of the entire estate, separate and community, of the deceased husband and with the same percentage of the federal estate tax. Her position was that she, or more accurately, the community, of which she was to receive one-half was the creditor of the separate estate of the husband and as such, should not have been charged with these items. The only accumulation of the community was the income from the separate property of the husband which vested under the law in the community as it accrued. Hence, there was no debt from the separate estate to the community, or to the widow. On the tax matter, counsel of the widow urged that it was inequitable for her to pay a large sum at a rate due to the size of the separate estate of which she would receive nothing. It was pleaded that she should pay at the rate levelled upon the community only. It was not suggested where the difference would come from in cases which might occur when the tax upon the separate estate plus the tax on community estate would not be as large as would the tax on the whole, which is the government's demand. The court very properly noted that the tax is demanded upon the whole, regardless of whether separate and community estates vary materially in size, and refused to change the distribution of the executor. It was further urged that since the widow was indebted to the community, she, as owner of half, should only be charged with half. The court reviewed the items of inventory wherein her indebtedness had been listed as an asset and agreed with the executor that since she had been credited with one-half already, she should now pay the whole.

25. 212 La. 563, 33 So. (2d) 114 (1947).

The plaintiff in *Ortego v. Morein*[26] was sole heir of his deceased father and was attempting to recover an undivided interest in a tract of land sold by his mother and in the hands of defendant. His claim was that the interest was community property and he advanced as proof instruments of acquisition indicating a credit deed during the community. It was clearly shown that these documents were confected in connection with the partition of the successions of his maternal grandparents, hence the property was clearly the separate property of his mother to which she had given good title.

In *Trahan v. Breaux*[27] plaintiff sought to recover $5,000.00 in damages for the "embarrassment, humiliation and mental anguish suffered by his wife" when he was falsely arrested in her presence by an officer without a warrant for a misdemeanor committed out of the officer's presence. The court stated that such damages would be the separate property of the wife under Article 2402 of the Revised Civil Code and could be recovered by the wife, alone. This statement of the rule seems clear and accurate though in previous cases the husband has been permitted to sue for his wife or jointly with his wife.[28]

In *Janney v. Calmes*[29] the sole issue was whether the suit was properly dismissed in the lower court on ground of "equitable and judicial estoppel." In accord with established jurisprudence the supreme court found that the plea of equitable estoppel was invalid because reliance had not been placed on the actions and no detriment had been suffered. The plea of judicial estoppel was also ineffective as the judicial confession was made in another suit. These exceptions were overruled and the case remanded.

Plaintiff, a partner in secret concubinage attempted in *Heatwole v. Stansbury*[30] to recover one-half of a homestead savings account, appearing after several transfers, in the name of the other partner. An agreement to pool earnings and jointly owned savings was pleaded. Since the alleged agreement was oral, it did not meet the legal necessities for a universal partnership.[31] No community of acquets and gains could be established because

26. 212 La. 774, 33 So. (2d) 516 (1947).
27. 212 La. 459, 32 So. (2d) 845 (1947).
28. See Daggett, The Community Property System of Louisiana (1945) 33 and cases cited.
29. 212 La. 756, 33 So. (2d) 510 (1947).
30. 212 La. 685, 33 So. (2d) 196 (1947).
31. See Art. 2834, La. Civil Code of 1870.

of the illicit relationship since there was no marriage and no putative marriage. The court stated that while concubines may assert legal claims arising out of business transaction between them, "strict and conclusive proof"[32] must be established which was lacking to support plaintiff's plea.

In *Cotton v. Wright*[33] the court pointed out that a judgment for separation of bed and board dissolves the community which is not reconstituted upon reconciliation of the spouses unless the spouses reestablish it by notarial act under Act 200 of 1944 amending Article 155 of the Revised Civil Code.

The court held in *Parker, Seale & Kelton v. Messina*[34] that when a suit by a wife for separation of bed and board is unsuccessful and the community of course is not dissolved, the attorney for the wife has a cause of action against the husband, head of the community, for fees upon a quantum merit basis, as the obligation is one which the community must assume.

MINERAL RIGHTS

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Servitude

The court held in *Ober v. Williams*[1] that a conditional promise to sell did not have the effect of a sale even after the conditions were performed by the prospective buyer nor until the deed translative of title was passed. Neither did the eventual sale have retrospective effect. Thus, the mineral servitude involved was not created until the title was transferred and prescription did not begin to run until that date.

Public policy was urged against the decision and fears expressed that minerals would be held in this fashion by contracts to sell. The court stated that if and when the contract was used for this purpose, it would be dealt with.

The effect of an acknowledgment was at issue in *James v. Noble.*[2] The intent and purpose of the paper was clearly to interrupt prescription against a mineral servitude. Since minors were holding the servitude, counsel for the plaintiff, landowner, and maker of the acknowledgment pleaded that the acknowledgment

32. 212 La. 685, 689, 33 So. (2d) 196, 197 (1947).
33. 36 So. (2d) 713 (La. 1948).
34. 36 So. (2d) 724 (La. 1948).
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1. 213 La. 568, 35 So. (2d) 219 (1948).
2. 36 So.(2d) 722 (La. 1948).